Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies	)	WT Docket No. 16-421
	)	
	)	
Mobilitie, LLC Petition for Declaratory Ruling	)	

REPLY COMMENTS OF THE COLORADO COMMUNICATIONS AND UTILITY ALLIANCE, THE RAINIER COMMUNICATIONS COMMISSION, THE CITIES OF SEATTLE AND TACOMA, WASHINGTON, KING COUNTY WASHINGTON, THE JERSEY ACCESS GROUP AND THE COLORADO MUNICIPAL LEAGUE

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SUMMARY

The Colorado Communications and Utility Alliance, the Rainier Communications Commission, the Cities of Seattle and Tacoma, Washington, King County, Washington, the Jersey Access Group and the Colorado Municipal League (referred to as the "Local Governments") appreciate the opportunity to submit these Reply Comments in this important proceeding. After review of the filed Comments, we believe the Commission must (1) disregard wireless industry Comments which fail to note specific local governments that are allegedly creating obstacles to wireless deployment; (2) focus on addressing whether or not utility companies are assisting, or, as is the more common scenario, refusing, to provide opportunities for wireless deployment; (3) refrain from imposing one-size fits all rules on all local governments throughout the nation; and (4) provide an education and advocacy role working with the industry and all levels of government on deployment issues.

One of the reasons that the Commission's record in this proceeding is lacking in substance is the industry's continued practice, despite warnings from the Commission, of presenting unnamed jurisdictions as bad actors so that the record appears replete with broad, national problems. However, with the exception of only a tiny percentage of named local governments, neither the Commission nor the accused entities have any idea who is actually being accused, or whether there is another side of the story. Adopting national, preemptory rules based upon anecdotes of actions allegedly taken by unnamed entities violates the principles of fundamental fairness and due process of law.

The record demonstrates far more positive comments about local government action than negative. Even in the industry comments that criticize some local governments, many also

applaud other local governments for positive steps in facilitating wireless broadband deployment. The record demonstrates that most local governments "do it right." For those that may not, we have courts or the Commission to address potential remedies on a case by case basis.

While the Commission should assist in promoting educational efforts, as we have described in our Comments, a federal one size fits all rules that preempt traditional areas of state and local authority would be arbitrary and capricious. We also assert here that there is no need to adopt a deemed granted remedy with respect to the Commission shot clocks adopted under 47 U.S.C. § 332(c)(7).

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These Reply Comments are filed by the Colorado Communications and Utility Alliance ("CCUA"), the Rainier Communications Commission ("RCC"), the cities of Tacoma and Seattle, Washington ("Tacoma" and "Seattle"), King County, Washington ("King County"), the Jersey Access Group ("JAG") and the Colorado Municipal League ("CML") (collectively referred to as "the Local Governments"), in response to the Wireless Telecommunications Bureau's Public Notice released December 22, 2016[1], and the Comments previously filed in this proceeding.

I. INTRODUCTION

In these Reply Comments, the local governments will make five (5) points: (1) as predicted in our Comments, many of the industry commenters failed to note specific local governments that are allegedly creating obstacles to wireless deployment, and these allegations should be disregarded; (2) recognizing that existing vertical infrastructure in the rights-of-way owned by utility companies can assist tremendously in providing opportunities for wireless

[1] *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, WT Docket No. 16-421 (WTB 2016) (Public Notice).

deployment, and that many utility companies refuse to allow wireless attachments, the Commission should focus on addressing these issues; (3) the vast majority of the evidence from all parties demonstrates that most local governments are collaborating effectively with the wireless industry to site wireless broadband facilities; (4) the Commission should refrain from imposing a deemed granted rule and any other one-size fits all rules on all local governments throughout the nation; and (5) the Commission can serve an effective role in education and advocacy, working collaboratively with industry, state and local government.

II. ARGUMENT

A. Allegations About Unnamed Jurisdictions Must Be Disregarded.

To their credit, some of the industry commenters did, in fact, identify individual jurisdictions by name, when complaining about actions allegedly impeding deployment. Problematically however, most did not. Comments filed by Mobilitie[2], Sprint[3], Nokia[4], Lightower Fiber Networks[5], California Wireless Association[6], Wireless Internet Service Providers Association[7], CTIA (the Wireless Association)[8], and Wireless Infrastructure Association[9] among others, referenced unnamed jurisdictions, with allegations about a variety of bad acts, and asserting that these actions are grounds for federal preemption. As we noted in our Comments[10],

[2] See, Comments of Mobilitie, LLC; Filed 3/8/17; Posted 3/9/17.
[3] See, Comments of Sprint Corporation; Filed 3/8/17; Posted 3/9/17.
[4] See, Comments of Nokia; Filed 3/8/17; Posted 3/8/17.
[5] See, Initial Comments of Lightower Fiber Networks; Filed 3/8/17; Posted 3/8/17.
[6] See, Initial Comments of California Wireless Association (CalWA); Filed 3/8/17; Posted 3/8/17.
[7] See, Comments of the Wireless Internet Service Providers Association (WISPA); Filed 3/8/17; Posted 3/8/17.
[8] See, Comments of CTIA; Filed 3/8/17; Posted 3/8/17.
[9] See, Comments of the Wireless Infrastructure Association (WIA); Filed 3/8/17; Posted 3/9/17.
[10] See, Comments of the Colorado Communications and Utility Alliance, the Rainier Communications Commission, the Cities of Seattle and Tacoma, Washington, King County Washington, The Jersey Access Group and the Colorado Municipal League ("Local Government Comments"); Filed 3/8/17; Posted 3/9/17

the foundation of our system of due process provides an opportunity for the accused to respond and defend itself. The Commission cannot act to preempt traditional areas of local and state authority without a strong record indicating both the legal authorization to do so, and an evidentiary basis supporting federal action. Allegations against unnamed communities that do not have the opportunity to defend themselves create no factual basis for Commission action even if it otherwise had the legal authority to do so.[11] The Commission must disregard all Comments critical of local governments, which do not specifically name the accused entities, and afford them an opportunity to respond.

B. One Area of Commission Focus Should Be Access To Non-Governmentally Owned Utility Poles.

As we noted in our Comments[12], and as has been also noted by other Washington State local governments[13], a significant number of existing vertical assets are street lights and utility poles owned by non-governmental entities such as utility cooperatives and private investor-owned utilities. Many utility companies allow attachments of wireless facilities, and recognize the importance of making these facilities available for wireless network deployment. However, many other utilities refuse to allow attachments of wireless facilities to their vertical assets. When

[11] We commend the Commission to the Comments of our local government colleagues which address the legal considerations at play in this proceeding. See, Comments of the City and County of San Francisco, pp. 14-24, filed March 8, 2017, posted March 9, 2017; Comments of the Cities of San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama; and Knoxville, Tennessee, at pp. 10-28, filed March 8, 2017, posted March 9, 2017; Comments of National League of Cities, National Association of Telecommunications Officers and Advisors, National Association of Towns and Townships, National Association of Counties, National Association of Regional Councils, Government Finance Officers Association, at pp. 16-26, filed March 8, 2017, posted March 8, 2017; Comments of The League of Minnesota Cities and the Minnesota Municipal Utilities Association, pp. 7-9, filed March 8, 2017, posted March 8, 2017; Comments of the City of New York, pp. 6-9, filed March 8, 2017, posted March 8, 2017.

[12] See, Local Government Comments.

[13] Comments of Bellevue, Bothell, Burien, Ellensburg, Gig Harbor, Kirkland, Mountlake Terrace, Mukilteo, Normandy Park, Puyallup, Redmond and Walla Walla, Washington, p. 3, filed March 6, 2017, posted March 6, 2017.

utilities refuse to allow small cell attachments, local governments are often just as frustrated as the wireless industry at this significant barrier to wireless deployment. The Commission now has evidence that as a result of these refusals, thousands of existing vertical assets in the rights-of-way that could otherwise be used for wireless network deployment are not available. One way the Commission can demonstrate its interest in in promoting deployment of wireless facilities in the rights-of-way, is to focus on the obligations of utilities and require these kind of attachments.

C. The Evidence in the Record Demonstrates That the Vast Majority of Local Governments Are Working Appropriately To Facilitate Deployment of Wireless Facilities.

There are approximately 36,000 general purpose local governments in the United States.[14] Even assuming the allegations are correct, the evidence in the record of specific jurisdictions that are allegedly acting in ways that delay deployment amounts to less than 1/10th of one percent of the nation's local governments. Indeed, with respect to local governments named by any party in this proceeding, there are more that were identified as taking proactive and positive steps to promote deployment as compared to those that are alleged to be delaying deployment.

As noted in our Comments, we represent communities of all sizes on both coasts and in the Rocky Mountain region. We represent diverse communities in the broadest possible sense, which creates different kinds of challenges in facilities siting related to weather and environmental conditions, geography and topography, and traffic flow. The Local Governments here represent over ten million residents and hundreds of jurisdictions, so the industry Comments specifically relating to our communities provide an excellent microcosm of industry Comments addressing local governments nationwide. Of all of the jurisdictions represented by the Local

[14] https://www.census.gov/govs/cog/ (last visited April 3, 2017).

Governments here, only one (Greenwood Village, Colorado) was identified as an alleged bad actor.[15] In its Comments, Crown Castle raised the issue of notification requirements to neighbors of a tower site, requirements for a neighborhood input meeting, and consideration by both the Planning Commission and the City Council.[16] Crown alleges that these requirements are "nothing but a way to circumvent the shot clock."[17] The allegation is disingenuous and patently false.

The residential areas within the small city of Greenwood Village, Colorado are fairly unique to the Denver-metropolitan area. Located within a short distance from highly developed urban and suburban communities, the residential areas of Greenwood Village that were the subject of Crown's Comments, are essentially rural, with dirt roads, and for many years this community and its elected leaders have pursued policies to keep it that way. Most electric utilities are underground, and there are no street light poles in these residential areas. Therefore, most applications in these areas are for new stand alone facilities in the rights of way. Applications in Greenwood Village have ranged in size from relatively short towers to much larger towers. It is a fact that because Greenwood Village does not have an inventory of poles upon which to locate wireless facilities in residential areas, new poles change the character of the Village. Therefore, it makes sense that in this community, Village residents have an expectation of a public process. Moreover, Crown Castle failed to advise the Commission that none of its applications were recent, and for at least one of them, alternative sites were suggested as an easier path to approval, but were rejected by Crown because they were not located within the rights-of-way. The fact that

[15] See, Comments of Crown Castle International Corp. ("Crown Castle Comments") at pp. 16, 21, 25; Filed 3/8/17; Posted 3/9/17.
[16] See, Crown Castle Comments at p. 16.
[17] See, Crown Castle Comments at p. 35.

none of the applications were recent is of critical importance. Colorado's General Assembly is close to final passage state legislation addressing small cell networks in public rights-of-way. Like other local governments in Colorado, Greenwood Village is carefully examining the new legislation, and will be working on necessary code amendments to implement it. Allegations of delay will no longer be relevant as the legislation calls for a final decision within ninety days of a complete application.[18]

Because of its rural residential character, Greenwood Village is unlike many of its neighbors. Yet regardless of whether one believes its community requirements for a public process when new stand-alone vertical infrastructure is proposed in rural residential areas are or are not appropriate, the fact that only one out of hundreds of communities in our diverse local government group has been identified as a problem lends further support to the fact that there is no factual record in this proceeding demonstrating that federal rules applicable to every local government in the nation are warranted.

Some of the statements from the Commission, taken together with the state of the evidence in this record, further demonstrate that broad federal preemption is not appropriate at this time. Chairman Pai's regulatory principles include these statements:

> Consumers benefit most from competition, not preemptive regulation…regulators should be skeptical of pleas to regulate rivals, dispense favors, or otherwise afford special treatment…The FCC is at its best when it proceeds on the basis of consensus[19]

In addition, Chairman Pai noted that the Commission should take a "light touch" when

[18] HB17-1193. Senate passage third reading, unamended, March 29, 2017. https://leg.colorado.gov/bills/hb17-1193 (last visited April 4, 2017).
[19] https://www.fcc.gov/about/leadership/ajit-pai (last visited, April 3, 2017).

addressing its regulatory position over wireless broadband deployment. This approach "… embraces regulatory humility, knowing that this marketplace is dynamic and that preemptive regulation may have serious unintended consequences."[20] It is only reasonable for this light touch to apply to all entities impacted by wireless deployment, and not just the wireless industry. Federal intrusion into traditional areas of local and state government control, especially given a record that does not provide factual evidence of market failure throughout a large percentage of jurisdictions, would be anything but a "light touch."

In addition, Commissioner O'Rielly has indicated that a "vast number" of local governments *are acting appropriately* in connection with wireless siting; and that others would be considered bad actors that might justify federal preemption.[21] There is certainly room for honest, good faith disagreement as to what justifies a "bad actor," but even in these cases, preemption should be used as a surgical strike, based upon the facts of a particular case, as Commissioner O'Rielly seems to suggest in recent Senate testimony. Recognition that a "vast number" of communities are doing the right thing is another reason why broad preemptory rules are inappropriate and should be avoided.

D. The Commission Should Not Adopt A Deemed Granted Remedy.

We commend the Commission for the new push for transparency. These practices, such as making items to be voted on available to the public prior to the meeting at which they are considered, is something local governments have been doing for many years. It is in this vein that

[20] Remarks of FCC Chairman Ajit Pai, speech before the U.S. – India Business Council, March 29, 2017.
[21] "While the vast number of communities see the benefit of broadband deployment and welcome providers seeking to serve their citizens, there are bad actors that will likely require preemptive measures by the Commission." Testimony before the U.S. Senate Committee on Commerce, Science & Transportation, March 8, 2017. http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0308/DOC-343816A1.pdf (last visited April 3, 2017).

we suggest that the Commission not consider a shot clock with a deemed granted remedy for consideration of wireless siting applications. Given its stated commitment to transparency and openness, we would hope that the Commission would not impose a regulatory regime on local and state governments including a new shot clock with a deemed granted remedy without imposing upon itself the same criteria for acting on petitions filed with the Commission.

From a practical standpoint, and as demonstrated in this record, most local governments respond and take final action timely. Still, there are times when workloads are impacted, multiple demands from multiple applications are placed on local government staff. At present, the wireless industry is treated comparably to all other applicants. The projects in the local government approval pipeline get addressed prior to applications that are subsequently filed by other parties. A new shot clock with a deemed granted remedy means that Commission will be forcing governments to inform the private property owner who applies for permits to build a housing development, shopping center, utility substation, commercial office complex or any other kind of proposal that: "We're sorry. Even though you filed before [Wireless Industry Applicant], the FCC has determined that your business interests are not as important as the wireless industry, so we must abide by the special rules the FCC has imposed just for that industry, and give their application priority over yours."

Chairman Pai is correct to note that broad, sweeping regulations lead to unintended consequences. The Commission must understand what practically happens today in those cases where a local government may not be able to act within an existing federal or state imposed shot clock. In the experience of these Local Government Commenters, it explains the situation to the industry applicant, demonstrates that the locality is moving forward in good faith and simply

needs more time, and the applicant almost always consents to the government taking additional, reasonable periods of time to complete the process. If a shot clock with a deemed granted remedy is imposed on local governments it will have an adverse impact on the Commission's deployment goals. Local governments will be put in a position of having to explain that while they need more time to address important issues related to a wireless application, the Commission has imposed demands that may require more of a rush through the process, without a thorough review of the safety issues, and a failure to act will result in the application being deemed granted. Therefore, since the local government will not have been given sufficient time to review the application given whatever its existing circumstances might be that would cause a need for more time, it will have no choice but to deny the application.

At some point in the future, the wireless industry will be more fully engaged with deployment of next generation wireless facilities – a process now in its nascent stages. At a later date, if and only if the Commission receives thousands of complaints against specifically named local governments about unreasonable actions delaying deployment, a discussion about a new shot clock with a deemed granted remedy might be appropriate. Based upon the record in this proceeding, that discussion is not merited now.

E. The Most Appropriate Role For The Commission Is To Assist In Educational And Advocacy Efforts Related To Wireless Network Deployment.

The Commission has in the past taken a proactive role in presenting and participating in educational and advocacy programs that have included all interested parties involved in wireless deployment. The Commission has additionally relied upon its Intergovernmental Advisory Committee ("IAC") and before that, its Local and State Government Advisory Committee, to

develop materials that have helped in this effort. These materials have included criteria to use in adopting moratoria,[22] a Local Official's Guide to Radio Frequency Emissions developed in conjunction with the Commission's Office of Engineering and Technology,[23], and the IAC's more recent paper on Report on Siting Wireless Communications Facilities.[24] It has also hosted meetings that have been streamed on line addressing a variety of siting and deployment issues, often in conjunction with both industry and government associations. We encourage the Commission to focus on promoting wireless network deployment by collaborating in these kinds of projects.

III. CONCLUSION

The record in this proceeding demonstrates that the majority of local jurisdictions are working timely, efficiently, and appropriately to address the new technologies of small cells. These facilities are often proposed to be located in public rights-of-way, and local governments are addressing how to facilitate the deployment of these networks in the broader context of all uses of the rights-of-way and within the framework of all local government responsibilities. The majority of the criticisms have been made against unnamed entities that have not been given notice that their alleged actions are being used as the basis to advocate for federal preemptory rules. Given the limited federal legal authority held by the Commission to dictate how a local government property must be used, and the value of that property that is charged to the user, there is simply an insufficient basis in the record to support preemptory actions.

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[22] https://transition.fcc.gov/Bureaus/Wireless/News_Releases/1998/nrwl8032.html. (last visited April 4, 2017)
[23] http://wireless.fcc.gov/siting/FCC_LSGAC_RF_Guide.pdf. (last visited April 4, 2017)
[24] https://transition.fcc.gov/statelocal/IAC-Report-Wireless-Tower-siting.pdf (last visited April 4, 2017)

The Commission should explore in more detail the unreasonable control that is being placed over many of the vertical assets already existing in public rights-of-way by utility companies, and whether it is appropriate for those utility companies to deny access to those facilities for the placement of wireless broadband infrastructure. Further, the Commission should focus on educational and advocacy efforts working *with* industry and all levels of government, as opposed to dictating to parties with legitimate interests how they must conduct their business.

Respectfully submitted, April 7, 2017.

THE COLORADO COMMUNICATIONS AND UTILITY ALLIANCE, THE RAINIER COMMUNICATIONS COMMISSION, THE CITIES OF TACOMA AND SEATTLE, WASHINGTON, KING COUNTY, WASHINGTON, THE JERSEY ACCESS GROUP AND THE COLORADO MUNICIPAL LEAGUE

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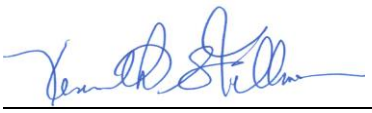
By: 

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